From Stephen Gillers, REGULATION OF LAWYERS (14TH edition, forthcoming)

Rule 4.2, forbidding a lawyer to communicate with another lawyer's client in certain circumstances, applies in both civil and criminal matters, as its comments recognize. The Sixth Amendment right to counsel also applies in criminal matters and prohibits the government from questioning an accused person outside the presence of his counsel after "judicial proceedings have been initiated." Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008) ("[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."). But even where the Sixth Amendment right has not yet attached, what about the no-contact rule? What if a person under investigation but uncharged is known to be represented by counsel in the investigation as in this problem? How if at all does Rule 4.2 apply?

For more than four decades, this seemingly simple question has prompted a debate not only about Rule 4.2, but also about federalism and separation of powers. Among the issues: Who should get to answer those questions? What should the answers be?

Construing the predecessor to Rule 4.2 in the Code, United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), stunned federal prosecutors in the circuit and nationally. It held that the rule *did apply* before initiation of judicial proceedings. *Hammad* transformed what had been a below-the-radar, largely inconsequential debate into a looming threat for the work of federal (and by implication state) prosecutors.

The government had sent an informant, Goldstein, to speak to Hammad, who was under investigation for arson and Medicare fraud but not yet charged. The government knew that Hammad had counsel. To bolster the informant's credibility, the government armed him with a fake grand jury subpoena. Hammad made incriminating statements on tape, which he moved to suppress. The court found a violation of the no-contact rule. The sham subpoena turned the informant into the prosecutor's alter ego. Since a prosecutor could not do what the informant did, neither could the informant. But the court declined to suppress the tape because the question was novel.

Although the *Hammad* ruling did not help Hammad himself, it loomed as a warning to federal prosecutors, especially in the Second Circuit. But not for long. Almost from the day it was decided, *Hammad* has been on life support. The Second Circuit has not overruled *Hammad*, but it has largely eliminated its precedential value. United States v. Binday, 804 F.3d 558 (2d Cir. 2015)* ("Since *Hammad,* this Court, in considering an alleged violation

* Binday was abrogated on another point in Ciminelli v. United States, 598 U.S. 306 (2023).

of Rule 4.2, has not found government conduct to fall outside the 'authorized by law' exception. [Precedent] makes clear that a pre-indictment undercover communication with a represented person does not *ipso facto* violate the rule"). Other circuit courts have rejected it explicitly. Cases are collected in United States v. Balter, 91 F.3d 427 (3d Cir. 1996) and United States v. Carona, excerpted below.

Hammad alarmed the Justice Department, not least of all because its boundaries are vague. Two successive attorneys general — Richard Thornburgh and Janet Reno — adopted Justice Department rules to limit its reach. They argued that so long as a federal prosecutor followed those rules, the conduct would be "authorized by law," an exception to the no-contact rule. That effort imploded when United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252 (8th Cir. 1998), held that the department did not have "valid statutory authority" to adopt its rules.

Then, also in 1998, Congress passed what has come to be known as the "McDade Amendment." The lesson here is be careful who you mess with or, as in this story, who you indict. Joseph McDade, a powerful congressman, was acquitted in 1996 of federal conspiracy and racketeering charges. Enlightened perhaps by the unhappy experience of being a federal criminal defendant, and distressed by the prosecutors' conduct, McDade returned to Congress and sponsored a bill that added Section 530B to Title 28 of the United States Code. Its aim was to leave no doubt that ethics rules that apply to other lawyers also apply to federal government lawyers. DOJ could not exempt them with a rule.

The McDade Amendment, as it became known, says that lawyers for the federal government "shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." The attorney general was directed to "make and amend rules . . . to assure compliance with this section." Those rules can be found at 28 C.F.R. Part 77. The key provision (§77.3) states:

<EXT>In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State, as these terms are defined in §77.2 of this part.</EXT>

As befits C.F.R. provisions drafted by a committee composed of lawyers, key phrases and nouns in this sentence are then separately defined.

Even though the McDade Amendment now binds Justice Department lawyers, the hard question remains: Is contact with a represented person whose Sixth Amendment right to counsel *has not yet attached* "authorized by law" within the meaning of Rule 4.2? The Eighth Circuit told us that the attorney general has no authority to answer that question, but a court does because, after all, Rule 4.2 is a court's own rule. The Ninth Circuit, which had favorably cited but distinguished *Hammad* in United States v. Talao, 222 F.3d 1133 (9th Cir. 2000), addressed that question in the next case.